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No. 02-1169

Supreme Court, U.S.
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In the
Supreme Court of the United States

CITY OF LODI, CALIFORNIA
Petitioner,

v.

FIREMAN'S FUND INSURANCE CO.,
UNIGARD INSURANCE CO., AND
UNIGARD SECURITY INSURANCE CO.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The reported decision of the Ninth Circuit below, wholly contrary to the relationship carefully crafted[1] by Congress between CERCLA (the federal "Superfund Act")[2] and state law, this Court's preemption decisions, and the substantive decision of the Sixth Circuit on CERCLA's preemptive effect, has called into immediate and serious question the very validity of every state or local statute or common law addressing the protection of public health or the environment from risks posed by released hazardous substances that is not virtually identical to CERCLA. Turning more than two decades of established remedial environmental jurisprudence regarding released environmental hazardous substances nearly completely on its head, the Ninth Circuit's reported decision has erroneously and without any valid support in the statute or case law held:

1) The three very broad and explicit provisions of CERCLA, sections 114(a), 302(d), and 310(h), that set forth

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[1] Petitioner, City of Lodi, California, recognizes that, since its original enactment, CERCLA has met with widespread judicial accord that many of its provisions could me more clearly drafted and better synchronized with other statutes. (*See e.g., Aviall Services, Inc. v. Cooper Industries, Inc.*, 312 F.3d 677, 684 (5th Cir. 2002) ("CERCLA is notorious for vaguely drafted provisions and an inconclusive, if not contradictory, legislative history.").) However, the precise language used in and the clear interrelationship among the three separate savings clauses set forth in CERCLA make them a rather rare example of congressional clarity however difficult may be their application in a given case.

[2] Comprehensive Environmental Response, Compensation & Liability Act of 1980 ("CERCLA"), as amended by the Super-fund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, 42 U.S.C. §§ 9601-9675.

the very unique and virtually non-preemptive[3] effect Congress intended that statute to have on state law, relate only to "field preemption" and not to "conflict preemption."

2) CERCLA's liability scheme preempts the provisions of a state or local statute or common law environmental remedial liability scheme in a action brought under such a state law and concerning a site at which CERCLA's liability scheme set forth in §§ 106 and 107 (42 U.S.C. §§ 9606 and 9607) has not, despite more than a decade of notice to appro-priate federal and state official regarding conditions at the site, been invoked by anyone authorized by congress to do so.

3) Notwithstanding the clear congressional command in CERCLA § 114(a), 42 U.S.C. § 9614(a), that CERCLA not be construed or interpreted to preempt any state (and presumably its political subdivisions as authorized by state law) from imposing additional liability with respect to released hazardous substances, that the provisions of the remedial environmental municipal ordinance at issue herein that allow for the imposition of more stringent (*i.e.*, more protective of human health or the environment) are preempted by CERCLA.

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[3] CERCLA § 114(a), 42 U.S.C. § 9614(a), provides that CERCLA shall not be construed or interpreted as preempting any state (and by implication, their political subdivisions as authorized by state law) from imposing any ***additional*** liability or requirements respecting released hazardous substances. CERCLA § 302(d), 42 U.S.C. § 9652(d), provides that CERCLA shall ***not affect or modify in any way*** the obligations or liabilities of any person under state law, including common law, regarding released hazardous substances. CERCLA § 310(h), 42 U.S.C. § 9659(h), provides that, except as to two matters that are irrelevant here, nothing in CERCLA affects or otherwise impairs the rights of any person under federal, state or common law.

In this case, several insurers have challenged the validity of the Municipal Environmental Response & Liability Ordinance or MERLO (Lodi Mun. Code §§ 8.24.010-8.24.090), an ordinance enacted by the City of Lodi to assist Lodi in responding to "an environmental public nuisance amounting to . . . a tremendous and serious groundwater contamination problem within Lodi's city limits." (*Connecticut Indemnity Co. v. Superior Court,* 23 Cal. 4th 807, 814 (2000) (internal quotation marks omitted).)

Three of MERLO's provisions are at issue here. First, MERLO § 8.24.040(E), very similar to the federal and state "Superfund Acts,"[4] allows Lodi to hold responsible parties jointly and severally liable for an entire indivisible environmental harm, reduced by Lodi's share of liability, if any, for such harm. (Those responsible parties are, in turn, free to assert, against anyone they wish, including Lodi, contribution claims to equitably apportion their joint and several liability pursuant to state or any other applicable law.) Second, MERLO § 8.24.040(F), as authorized by state law,[5] allows prevailing parties to recover their attorney's fees in proceedings pursuant to MERLO. Third, MERLO § 8.24.030(A)(5) allows Lodi to impose more stringent (*i.e.,* more protective of public health or the environment) clean-up requirements than would be required for consistency with the National Oil and Hazardous Substance Pollution Contingency Plan ("NCP") (40 C.F.R. Part 300) in an action under CERCLA.

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[4] *See e.g.,* Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) Cal. Health & Saf. Code §§ 25300-25395.15.

[5] California Government Code § 38773.5(b) authorizes cities to provide for the recovery of attorney's fees by prevailing parties in actions to abate nuisances.

The Ninth Circuit held that those aspects of MERLO conflict with and are preempted by CERCLA. It held, in effect, that a municipal law cannot confer upon a municipality any benefit or litigation advantage that would not be available to it in an action under CERCLA because such laws stand as obstacles to the purposes of CERCLA. (*See Fireman's Fund Insurance Co. v. City of Lodi,* 302 F.3d 928, 946-53 (9th Cir. 2002).) The Ninth Circuit's decision is a startling departure from long-standing and well-accepted preemption jurisprudence given CERCLA's savings clauses, and given that the Lodi site has no continuing federal involvement, is not on the National Priorities List, and is a site at which CERCLA has not been invoked. (*See* Lodi Pet. for Writ of Cert., Feb. 5, 2003 ("Pet."), at pp.13-16.) Because the Ninth Circuit effectively gutted MERLO by invalidating its most important provisions, Lodi seeks this Court's review of the Ninth Circuit's decision.

ARGUMENT

I. MERLO does not and could not shield Lodi from liability or shift Lodi's liability, if any, onto others.

In its opposition, Fireman's Fund attempts yet again to divert attention from its self-serving campaign to delay and impede Lodi's efforts to secure and apply the proceeds of the liability insurance policies it issued to responsible parties at this site to the investigation and clean-up of the site by parading out its oft-repeated mischaracterization of "MERLO . . . [as] an elaborate scheme to shift Lodi's CERCLA liability onto others." (Fireman's Fund Brief in Opp. to Pet. for Writ of Cert., Mar. 7, 2003 ("Opp."), at pp. 4, 3.)

That is, of course, nonsense. MERLO does not shield, cannot shield, and has never been construed or argued by Lodi, its lawyers, or anyone else charged with its enforcement, to shield Lodi from liability it rightfully bears,

or to shift Lodi's liability, if any, under any applicable law onto others. On the contrary, anyone held jointly and severally liable pursuant to MERLO is absolutely free to assert contribution claims against Lodi, and MERLO, as local legislation, cannot shield Lodi from such claims. (*See* Pet. at pp. 16-19.) Thus, if Lodi is ultimately not held liable, based on CERCLA or any other federal or state law, for the contamination at the Lodi site, it will ***not*** be because of MERLO.

II. This case is ripe for Supreme Court review.

In its opposition, Fireman's Fund argues that Lodi's petition is premature and that this matter is not yet ripe for Supreme Court review since several issues presented by the petition could be mooted if, on remand, the District Court determines that Lodi is not a "PRP" (*i.e.*, a responsible party) under CERCLA. (*See* Opp. at pp. 9-10.)

However, this case is very ripe for Supreme Court review. First, as a matter of appellate jurisdiction, "[t]he Supreme Court has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals and other federal courts whose judgments are reviewable pursuant to [28 U.S.C.] § 1254(1). Invocation of such jurisdiction . . . is not conditioned on the finality of the judgment or order in question." (Robert L. Stern, *et al., Supreme Court Practice,* at § 4.18, p.195 (7th ed. 1993).) For example, "[c]ertiorari was . . . issued to review a non-final judgment where there was a conflict on a question of law with another court of appeals or a highest state court, a conflict which would justify review of a final decree or judgment." (*Id.*, at § 4.18, p.197 (citing cases).) More to the point, certiorari has also been issued in numerous non-final preemption cases. (*See e.g., International Paper Co. v. Ouellette,* 479 U.S. 481 (1987); *Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1996); *Buckman Co.*

v. Plaintiff's Legal Comm., 531 U.S. 341 (2001); *Pegram v. Herrich,* 530 U.S. 211 (2000); *Freightliner Corp v. Myrick,* 514 U.S. 280 (1995); *Gade v. National Solid Wastes Mgmt. Assoc.*, 505 U.S. 88 (1992).)

Second, the only reason the Ninth Circuit remanded this matter to the District Court to determine whether Lodi is a "PRP" was because of its ruling that, if Lodi is a "PRP" under CERCLA (even though there is no CERCLA action pending at this site), then Lodi cannot impose joint and several liability under state or municipal law on, or recover attorney's fees under state or municipal law from, other responsible parties in a state law public nuisance abatement action. (*Fireman's Fund,* 302 F.3d at 945-47, 952-54.) As such, if this Court grants certiorari and reverses the Ninth Circuit's decision, then there will be no need for the remand, and the District Court, Lodi, the insurers herein, and the over 100 parties involved in a related case before the same District Judge (hearing ***only*** state law claims on supplemental jurisdiction) can all avoid the substantial time, effort and expense of litigating a claim that no one has even asserted against Lodi. Thus, it would make no sense to deny certiorari in order to allow that (nonexistent) claim to be litigated. On the contrary, certiorari should be granted so that, if the Court sustains Lodi's position, litigation of that claim can be avoided and the court-ordered clean-up of this site can commence.

Third, because the parties disagree on what the Ninth Circuit meant by the term "PRP," it is not even clear what issue the Ninth Circuit remanded to the District Court. Lodi contends that "PRP" must mean "responsible party" and thus that the issue on remand must be whether Lodi would be a ***responsible*** party under CERCLA were there an action to impose direct liability under CERCLA. The insurers and other parties, however, interpret "PRP" to mean "potentially responsible party" and thus the issue to them is whether Lodi

is a ***potentially*** responsible party under CERCLA. As such, the parties are all about to embark upon an incredibly time-consuming and expensive endeavor that could turn out to be a monumental waste of time if this Court or the Ninth Circuit later determines that the District Court misinterpreted the Ninth Circuit's use of the undefined term "PRP."

Fourth, even if the Court were to deny certiorari and the District Court were to find that Lodi is not a "PRP" (whatever that term turns out to mean), the Ninth Circuit's decision is still published and it will still continue to have a profound adverse impact on state or local governments that wish to respond to environmental contamination and to exercise their police powers to protect public health, welfare, and the environment without invoking CERCLA. If the state or local statutes or common law differ from CERCLA's liability scheme, they are already victims of the Ninth Circuit's reported decision. Such state and local governments will be forced to incur the delay and expense of addressing wholly irrelevant "preemption issues" relating to differences between CERCLA and the state or local law at issue. This is precisely the opposite effect Congress intended for CERCLA to have on state and local law.

III. This case meets the criteria for certiorari under Supreme Court Rule 10.

Finally, Fireman's Fund also argues in its opposition brief that this case does not meet the criteria for certiorari because, in its opinion, the Ninth Circuit's decision does not involve an important question of federal law and does not conflict with decisions of this Court, of other circuit courts, or of the California Supreme Court. (*See* Opp. at 10-16.)

However, contrary to Fireman's Fund's assertion, this case does indeed involve an immensely important question of federal law (*i.e.*, whether CERCLA preempts state or local

laws that confer some benefit or litigation advantage to litigants that would not be available to them in an action under CERCLA). Similarly, the Ninth Circuit's resolution of that issue (*i.e.*, that CERCLA preempts such laws) does indeed conflict with decisions of this Court, of other Circuit Courts of Appeal, and of the California Supreme Court.

The Ninth Circuit's decision conflicts with *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409 (6th Cir. 1991) and thereby creates a circuit split between the Ninth and the Sixth Circuits. The Sixth Circuit concluded in *Akzo Coatings* that CERCLA only preempts ***less protective*** clean-up requirements that a state or local government may try to apply to federally funded clean-up actions. (*Akzo*, 949 F.2d at 1454-55 ("Congress has neither expressly stated that CERCLA preempts state environmental regulation, (beyond the obvious preemption of less stringent state standards), nor enacted so comprehensive a statute that we may infer an intent to displace all supplementary state regulation.").) As the Sixth Circuit put it, "CERCLA sets only a floor, not a ceiling, for environmental protection." (*Akzo*, 949 F.2d at 1454.) Thus, the Ninth Circuit's contrary decision that CERCLA only preempts ***more protective*** clean-up requirements (even when CERCLA has not been invoked) stands in diametric opposition to the Sixth Circuit's holding in *Akzo Coatings* and thereby creates a conflict between the Ninth and the Sixth Circuits.

The Ninth Circuit's decision also conflicts with the California Supreme Court's decision in *American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578 (1978) and its progeny. In *American Motorcycle*, the California Supreme Court held that, under California's comparative responsibility system, a plaintiff's contributory liability for his own indivisible injury does ***not*** bar him from imposing joint and several liability on two or more persons who cause or

contribute to a single indivisible injury; however, joint and several liability is reduced by the plaintiff's share of liability. (*Id.*, at 586-90.) That holding has long governed the statutory and common laws of public nuisance abatement in California and has allowed for the timely implementation of injunctive abatement orders necessary to protect the public or abate public nuisances in California, even where it is alleged that the governmental plaintiff is also liable. Now, that conflicts with the Ninth Circuit's decision that liable parties cannot impose joint and several liability on others for indivisible injury respecting released hazardous substances if they could not do so under CERCLA (even when, as here, CERCLA has not been invoked). (*Fireman's Fund,* 302 F.3d at 945-47.)

The Ninth Circuit, however, asserts that its decision is consistent with rulings from other circuits: "Where municipal legislation comes into conflict with CERCLA, we find the municipal legislation to be preempted, just as other circuits have found conflict preemption in other circumstances, notwithstanding the same savings clauses cited by Lodi." (*Id.*, at 952, n.26 (*citing Bedford Affiliates v. Sills,* 156 F.3d 416, 426-27 (2d Cir. 1998); *In re Reading Co.,* 115 F.3d 1111, 1117 (3d Cir. 1997); *PMC, Inc. v. Sherwin Williams Co.,* 151 F.3d 610, 617-18, 620 (7th Cir. 1998)).)

Those cases, however, are readily distinguishable from this case and, in fact, Lodi has absolutely no disagreement with their holdings (although, in some cases, the basis thereof could have been more accurately stated). In those cases, the Second, Third, and Seventh Circuits stopped a party's attempt to invoke state statutory or common law remedies as an end-run around a particular requirement of CERCLA ***in a CERCLA action***. (*Bedford,* 156 F.3d at 426-27; *Reading,* 115 F.3d at 1117; *PMC,* 151 F.3d at 618.) Those cases are not really "preemption" cases, but rather involve the exclusivity of the remedies available under the liability

scheme set forth in CERCLA §§ 106, 107 and 113. (Namely, CERCLA's contribution provision, § 113, is the ***sole*** method intended by Congress to be available to apportion among responsible parties liability imposed pursuant to CERCLA's direct liability provisions, §§ 106 and 107. State law contribution schemes may not be used to bypass the conditions and requirements set forth in § 113 when attempting to apportion liability imposed pursuant to CERCLA.) In contrast, in the present action, CERCLA's liability scheme has not been triggered and Lodi is not seeking to use MERLO to end-run around the requirements of CERCLA in a CERCLA action.

CONCLUSION

For the foregoing reasons, the City of Lodi requests that this Court grant its petition for writ of certiorari.

Respectfully submitted,

March 20, 2003

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